OR 12-5-96

IN THE SUPREME COURT OF FLORIDA

Case No. 88,609

CECIL LANE, DEWEY E. DESTIN, JR., BUDDY BROWN, JULIE A. RUSSELL, and MIKE DAVIS,

Appellants,

- AGAINST -

LAWTON M. CHILES, as Governor of the State of Florida; ROBERT A. BUTTERWORTH, as Attorney General of the State of Florida; and the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellees.

On Certified Judgment from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida
Case No. 95-2972

REPLY BRIEF FOR APPELLANTS

GRANGER, SANTRY, MITCHELL & HEATH, P.A.

FRANK J. SANTRY
FL BAR ID # 0202231
VICTORIA E. HEULER
FL BAR ID # 0984825
2833 Remington Green Circle
Post Office box 14129
Tallahassee, Florida 32317
(904) 385-3800; FAX (904) 385-3862

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PREFACE

Four Answer Briefs were filed in this case, one an behalf of Appellees Chiles and Butterworth, one on behalf of Appellee Department of Environmental Protection, and one an behalf of each of the two intervenors. Where necessary, page references to specific briefs have been used. For general references, however, the generic term "Appellees" has been used when referring to various arguments set forth by one or more of the Appellees.

I.

BALLOT SUMMARY

This Court is not precluded from reviewing serious deficiencies in the ballot summary which was prepared for article X, section 16, Florida Constitution. In fact, fairness requires that the Court exercise its discretion to reconsider ballot summary issues in order to determine whether, in light of information not previously available to the Court, the ballot summary was so deficient that the public could not have understood the ramifications of the amendment.

1. Laches does not preclude the review of ballot summary issues.

The Court is not precluded by the doctrine of laches from considering ballot summary deficiencies. The defense of laches must be asserted as an affirmative defense, or the defense is waived. See 1.140(b) and (h), Fla. R. Civ. P,; Goldberger v. Regency Highland Condo. Assoc., 452 So. 2d 583, 585 (Fla. 4th DCA 1984). None of the Appellees (Defendants, below) asserted any

affirmative defenses to the original and amended complaints filed in this case. Appellees waived the right to assert laches.

2. The fact that the amendment was adopted by a majority of voters does not cure ballot summary defects.

Appellees misunderstand the law when they state that the adoption of article X, section **16** cured any defects in the ballot summary. Appellees cite to Pearson v. Taylor, 32 So. 2d 826 (Fla. 1947) to suggest that the voters could have been misled by the ballot summary for article X, section 16, but that any defects in the summary which misled voters were cured by majority approval of the measure. In the Pearson case, an affected party complained that the petition to adopt a local option prohibiting the sale of liquor lacked the requisite number of signatures. Although the Court agreed that the requisite number of signatures had not been obtained, it would not **void** the local option just because of the technical signature deficiency.

Here, the asserted deficiencies are not "technical." The ballot summary was deficient because it failed to properly inform voters of the full ramifications of the measure they were being asked to include in the Constitution. The Court has previously rejected the argument that a favorable vote cures ballot summary deficiencies. Wadhams v. Bd. Of Countv Commissioners of Sarasota Ctv., 567 So. 2d **414 (Fla. 1990).** The Court in Wadhams held that ballot summary deficiencies were more than just defects in form and went to the "very heart" of what the ballot summary statute seeks to preclude, Id. at 417. As the Court stated,

> it is untenable to state that the defect was cured because a majority of the voters voted in the

> affirmative on a proposed amendment when the defect is that the ballot did not adequately inform the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with certainly what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the [ballot summary] statute, and had been told "the chief purpose of the measure."

Id. (emphasis original). Wadhams is directly on point and is controlling precedent.

3. Appellants were not required to seek mandamus relief prior to the amendment's adoption.

Although a writ of mandamus may be a method of review for strictly legal questions, such as whether a proposed amendment contains more than one subject, Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), Appellants did not forego their right to challenge ballot summary deficiencies simply because they did not pursue an extraordinary writ to keep the measure from the ballot. Appellees have cited to no rule of law that states that legal challenges to ballot summaries are waived unless affected parties first seek a writ of mandamus prior to vote.

Appellants would have preferred to address ballot summary issues before the Court issued its advisory opinion regarding the amendment's technical compliance with single subject and ballot summary requirements. As thoroughly discussed in the Initial Brief, the Court's prior review of the ballot summary was only advisory and in no way precludes review of ballot summary issues of which the Court was not previously made aware[1].

[1] See Advisory Op. to Attornev General re: Tax Limitation, 673 So. 2d 864 (Fla. 1996)(subsequent review of ballot summary issues not barred where Court had not previously considered vital issues).

4. The ballot summary for article X, section 16 is clearly and conclusively defective

The "clearly and conclusively defective" standard has been used by the Court to invalidate proposed ballot measures which fail to comply with Section 101.161, Florida Statutes. A ballot summary is clearly and conclusively defective if it fails "to specify exactly what was being changed, thereby confusing voters." Fla. League of Cities v. Smith, 607 So. 2d 397, 399 (Fla. 1992). It is also clearly and conclusively defective if it "omits to state a material fact necessary in order to make the statement made not misleading[2]." Wadhams v. Bd. of County Commissioners, 567 So. 2d 414, 416 (Fla. 1990). See also Smith v. American Airlines, Inc., 606 So. 2d 618 (Fla. 1992) (ballot summary defective because it failed to advise voters that taxes on post-1968 leaseholds of government-owned property could increase as much as fifteen times the current tax rate).

The ballot summary for article X, section 16 was clearly and conclusively defective because it failed to give voters information which was necessary in order to make the summary not misleading and inform voters of the material ramifications of the

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[2] Appellees complain that they would be unable to comply with the 75 word ballot summary limitation set forth in 101.161, Florida Statutes, if they were required to notify voters of the ramifications of the amendment. The statutory requirement for ballot summaries was enacted for a specific and necessary purpose, to prevent voters from being misled and uninformed on measures sought to be added to the constitution. Propanents of constitutional amendments have a duty to comply with the statute, and if compliance is impossible, then it is improper to submit the measure to voters.

amendment[3]. Article X, section 16 presents issues of first impression for the Court.

Appellees cite to Sylvester v. Tyndall, 18 So. 2d 892 (Fla. 1944) for the proposition that the issues involved in the instant appeal have already been "dealt with." This is not true. The proposed amendment under review in Sylvester established the Game and Fresh Water Fish Commission and was not legislative in nature. Additionally, the proposal was placed on the ballot through a legislative referendum, not by popular initiative[4]. The proposal, therefore, passed through a system of checks and balances prior to adoption.

Although the Court in Sylvester was asked to strike the proposal from the ballot because of the alleged failure to notify voters as to what they were voting on, the Court held that the posting of the ballot for three months at each polling place was sufficient notice to voters, and that any defects in the ballot were minor and cured by adoption[5]. 18 So. 2d at 895.

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[3] Appellees suggest that the Court should disregard the public opinion poll conducted by Dr. Marc Gertz and associates. Any purported issues regarding the significance of polling results were not litigated and not adjudicated by the trial court. Naturally, Appellees' expert witness disagrees with the methodology and result of the opinion poll. The poll is not presented here for the purpose of "proving" that voters would vote differently based on being given certain information; it is merely an aid for the Court to assess whether information withheld from voters was material and should have been included in the ballot summary.

[4] The initiative method of amending any portion or portions of the Constitution was not added until 1972. Art. XI, § 3, Fla. Const.

[5] At the time of the Court's decision in Sylvester, the only requirement for ballots submitted for public vote was that the

Although Appellants have fully addressed ballot summary issues in the Initial Brief, several criticisms to specific ballot summary arguments need to be addressed here.

a) Failure to inform of existing statutes and rules

Appellees criticize Appellants' citation to several of the Court's prior holdings because the instant amendment is not on all fours with those decisions. See Answer Brief of Appellees Chiles and Butterworth, pp. 42-44. The same principles espoused in these prior decisions apply to the instant controversy, namely that voters should be informed of material effects of the amendment and should not be misled. For the reasons fully articulated in the Initial Brief of Appellants, voters were deprived of material information regarding the ramifications of article X, section 16 which potentially misled them and prevented them from casting an informed and intelligent ballot.

Appellees seek to limit the Court's inquiry to whether voters knew what the amendment's chief purpose was. There is no question that the chief purpose was to ban certain nets, as Appellees point out, but the Court has not limited its ballot summary inquiries to only whether voters were informed of the chief purpose. Evolving judicial precedent has determined that, along with informing voters of the chief purpose, the ballot summary must be "accurate and informative," and must "give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots." Advisory Op. to Attorney

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substance of each amendment be printed on the ballot one time, and that the ballot contain the phrases "for the amendment" and

General re: Casino Authorization, Taxation and Regulation, 656 so. 2d 466, 468 (Fla. 1995)(citing Smith v. American Airlines, Inc., 606 So. 2d 618, 620-621 (Fla. 1992)(emphasis added). The failure of the ballot summary to notify voters of existing statutes and regulations certainly falls into the category of evils section 101.161, Florida Statutes, seeks to prevent.

b) Failure to inform that purse seines would be prohibited, not iust limited

Appellees Chiles and Butterworth have not denied in their Answer Brief at pages 44-46 that article X, section 16 results in a ban on the use of purse seines in nearshore and inshore Florida waters because such nets cannot be constructed to meet the amendment's 500 square foot limitation. In an attempt to circumvent the fact that these nets are now banned in nearshore waters and that voters were never notified through the ballot summary of this serious ramification, Appellees state that some of the Appellants previously fought the imposition of an administrative rule which would have explicitly banned purse seines in nearshore and inshore waters. In the rule challenge, Appellants and other affected parties asserted, as they had a right to assert, that the rule was broader than the explicit language of the constitutional amendment and that the Florida Marine Fisheries Commission (MFC) did not have authority to promulgate a rule which exceeded the express language of the amendment. The amendment does not expressly ban purse seines from nearshore and inshore waters, and therein lies the problem.

"against the amendment," followed by a blank space for the placing of an "X" by the voter, § 99.16, Fla. Stat. (1941).

Voters did not vote for a ban on purse seines; they voted for a limitation. The amendment's effect, however, is to ban purse seines in nearshore and inshore waters. The fact that the MFC did not have specific authority to promulgate a rule which was more restrictive than the express language of the amendment does not negate the fact that voters were not informed of the real effect that the amendment has on purse seines. The former was a challenge to rulemaking authority, whereas the latter is a challenge to the fact that the public voted for something that is actually more extensive than they could have known about by reading the ballot summary.

c) Failure to inform of mullet fishery elimination

Contrary to Appellees' assertions, informing voters that the explicit net bans in article X, section 16 would severely impact, if not close, current commercial mullet fishing enterprises is not "merely a disputed practical effect of the Amendment on a limited group of commercial fishermen." Answer Brief of Appellees Chiles and Butterworth, p. 46. The ban on gill and entangling nets has the effect, both legal and practical, of outlawing the very implements which are required for a viable commercial mullet fishery in Florida. See R. Vol. V, p. 759. 80% of commercial mullet have historically been caught with gill and entangling nets in Florida waters, the use of such nets which is now prohibited. R. Vol. II, p. 276; R. Vol. V, p. 759.

The effective closure of Florida's profitable mullet fishery was a material ramification of the amendment of which voters were never advised. The effects of the amendment cannot be minimized

by stating that voters knew the amendment was going to ban nets - voters could not have known from the ballot summary how the ban was going to affect the state's mullet fishery. See Smith v. American Airlines, Inc., 606 So. 2d 618, 621 (Fla. 1992)(burden of informing public about amendment's ramifications should not be left to the press, but is the responsibility of the ballot title and summary).

d) Failure to inform of fiscal impacts

As fully explained in the Initial Brief, the amendment has taken Appellants' fishing property without just compensation. Florida leaders and the MFC were fully aware prior to the amendment's adoption that fishermen would no longer have viable uses for gill and entangling nets, and purse seines, and that the displacement of thousands of commercial fishermen would require some type of state unemployment compensation. The impact to the State treasury was anticipated and voters should have been advised that tax dollars would be used to compensate out-of-work fishermen and buy back their useless property. See Advisory Op. to Attorney General re: Tax Limitation, 644 So. 2d 486, 495 (Fla. 1994) (fiscal impact, including compensation packages, must be included in ballot summary in order to properly advise voters of a measure's full ramifications).

II.

CONSTITUTIONAL VIOLATIONS

As more fully set forth in the Initial Brief, Appellants have shown the Court sound bases for reviewing the constitutionality of article X, section 16 with a high level of judicial scrutiny. Naturally, Appellees disagree that the Court should view this amendment with any greater scrutiny than would be accorded a statute enacted by the Legislature. Appellees basically suggest that the Court is without power to judicially critique the amendment, advocating instead that the Court simply give the amendment cursory review. Although recognizing that this amendment went through no pre-ballot constitutional checks and balances to protect the rights of those affected by the amendment, Appellees insist that the amendment deserves the same level of deference that is given to acts of the legislature or agency rules that do pass through rigorous checks and balances. For the reasons stated in the Initial Brief and herein, Appellees are wrong.

1. The "California example" is inapplicable to the scrutiny to be applied to article X, section 16, Florida Constitution.

Appellees urge the Court not to engage in heightened review of article X, section 16, citing to California judicial decisions. The California Supreme Court has interpreted its constitution as requiring that initiative measures be shown due deference, the lowest level of scrutiny. The Florida Supreme Court has rejected the applicability of a low level of scrutiny when reviewing initiative constitutional amendments and should

not use California decisions as a measuring stick. See Fine v. Firestone, 448 So. 2d 984 (Fla. 1984)(heightened scrutiny applied to review of initiative amendment because of lack of checks and balances available for initiative proposals).

The initiative power in California is different from the initiative power under the Florida Constitution. The California Constitution explicitly provides that voters can propose, and adopt or reject, statutes to the Constitution. Art. 2, § 8, Cal. Const. This right is in addition to, and distinct from, the right to propose amendments to the Constitution. AFL-CIO v. Eu, 206 Cal.Rptr. 89, 93, 36 Cal.3d 687, 694, 686 P.2d 609 (Cal. 1984) ("[t]he initiative power is the power to adopt 'statutes' - to enact laws . . . ." "The initiative also includes the power to amend the state Constitution."). Thus, the California Constitution is a hybrid document, on one hand being a repository for statutes directly enacted by the people, and on the other hand being a document of fundamental constitutional principles.

The initiative power under the California Constitution has been broadly construed to give full effect to the power of California voters to propose and adopt statutes to their constitution. Raven v. Deukmeiian, 52 Cal.3d 336, 341, 276 Cal.Rptr. 326, 329, 801 P.2d 1077 (Cal. 1990). Because the power to propose and adopt statutes is expressly shared between the California Legislature and the people, California courts have given the peoples' right to adopt statutes the same deference that is given to statutes adopted by the Legislature. See e.g. California Gillnetters Assoc. v. Dent. of Fish and Game, 39

Cal.App.4th 1145, 46 Cal.Rptr.2d 338, (Cal. Ct. App. 4th 1995), review denied (Jan. 24, 1996) (ban on use of certain fishing gear added to California Constitution via statutory initiative upheld under deferential standard applied to legislative acts).

Additionally, California statutory initiatives are subject to more checks and balances than are amendments to the Florida Constitution. Initiatives must be submitted by the Attorney General to the California Legislature, after which the appropriate committees can hold public hearings on the subject of the initiative. Cal. Elec. Code § 9007 (West 1995). Initiative ballots in California must also include the following:

1. an estimate of the amount of any increase or decrease in revenues or costs to the state or local government, or an opinion as to whether or not a substantial net change in state or local finances would result if the proposed initiative is adopted (Cal. Elec. Code § 9005 (West 1995));

2. a copy of arguments and rebuttals for and against each measure (Cal. Elec. Code § 9084 (West 1995)); and

3. a copy of the impartial analysis of each measure prepared by the Legislative Analyst (which may contain background information, including the effect of the measure on existing law, and which should set forth information the average voter needs to adequately understand the measure)(Cal. Elec. Code § 9084; 9087 (West 1995)).

Amending the Florida Constitution via the initiative process is different than the California process. The Florida Constitution does not give voters the explicit right to propose statutes to the Constitution. It merely allows voters to propose and adopt amendments to the existing Constitution. Florida's Constitution has never been interpreted as a proper repository for statutes, nor has this Court ever held that voters have the

right to propose and adopt statutes to the Constitution. Initiative proposals in Florida also do not have the protections in place that are required for statutory initiatives in California.

The peoples' right to amend the Florida Constitution is secure, but amendments to the Constitution by initiative require serious judicial scrutiny in order to protect the framework of the Constitution and prevent it from turning into the hybrid that has been approved in California[6]. As previously analyzed in the Initial Brief, initiative amendments in Florida must be scrutinized for harmony with the purpose and foundation of the state Constitution. As Justice Kogan stated in his concurring opinion striking a proposed initiative amendment from the ballot, "the various parts of the Constitution require a harmony of purpose both internally and within the broader context of the American federal system and Florida law itself." Advisory Op. to Attorney General - Restricts Laws Related to Discrimination, 632 so. 2d 1018, 1022 (Fla. 1994).

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[6] Californians have become increasingly discontent with the broad initiative power in California, as evidenced by legislation in 1991 which established a commission to review ways of improving the initiative process. 1991 Cal. Stat., Res. Ch. 120 (A.C.R. 13). Concerns included the fact that important public policy decisions were being determined, not by elected officials or broad-based groups, but by narrow and unaccountable special interest groups with generously financed campaigns; that a disturbing number of initiative measure drafted so as to be financially beneficial to their sponsors; and that an increasing frequency of initiatives which were borne of an "initiative industry" of paid petition circulators and campaign consultants.

2. Decisions from other jurisdictions are inapposite and inapplicable.

First, Appellants agree with Appellees that commercial fishermen are not a suspect class, and that fishing is not a fundamental right, either under the Florida or United States Constitution. Cases cited by Appellees that hold that fishing is not a fundamental right or that fishermen are not a suspect class are, therefore, irrelevant.

Second, all cases cited by Appellees which construe state or federal statutes or regulations are inapposite because statutes and regulations are subject to checks and balances which protect minority rights, while an initiative in Florida is not. It is the lack of any checks and balances, coupled with preparation and proposal by special interests, that require this Court's heightened scrutiny of article X, section 16. All of the fishing regulation cases cited by Appellees involve judicial review of statutes or rules, not constitutional amendments, and are irrelevant to the instant issues.

Appellants' right to due process and equal protection must be analyzed under a more elevated level of scrutiny than is provided to acts of the Legislature (statutes), or rules of a government agency adopted pursuant to delegated legislative authority, if the rights of a minority of citizens are to be protected against majority tyranny. There <u>are no</u> protections available to Appellants to vindicate constitutional guarantees other than judicial review.

As analyzed in the Initial Brief, pp. 14-31, at the very least this Court should determine whether the prohibitions and limitations of article X, section 16 are necessary in light of the constitutional rights being invaded, and whether the method of regulation is the least intrusive means of invading Appellants' constitutional rights. Additionally, the Court must critically analyze and determine whether the behavior of a particular group of citizens should be subjected to regulation through an amendment to the Constitution which was proposed and supported by special interests, with no pre-enactment checks and balances.

Appellees are advocating to the Court that if a group of citizens desires to impose regulations on another group of citizens and are unable to persuade the Legislature to their cause, the Constitution may be used to further the group's goals unbridled by any substantial judicial review. Appellees urge the Court to simply overlook that Appellants' valuable constitutional rights are being violated because, as Appellees interpret it, the initiative method of amending the Constitution includes the right to oppress a minority of citizens. Surely, this interpretation cannot stand in the face of strong constitutional protections afforded each individual under the Florida Constitution. See generally, Article I, Florida Constitution. Constitutions are specifically designed to prevent majority tyranny of the minority. See David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States, 185 (1984) (founders of

the American constitutional system consciously insulated fundamental freedoms from the whims of momentary majorities).

3. If article X, section 16 diminishes basic state constitutional rights, then single subject and ballot summary requirements were violated.

Intervenors, the Florida Wildlife Federation, assert in their Answer Brief, pp. 9-11, that if article X, section 16 conflicts with other provisions in the Florida Constitution, article X, section 16 must prevail, even if it violates Appellants' state constitutional protections. If, as Appellees suggest, article X, section 16 supersedes existing constitutional protections and diminishes protections previously available to Appellants under Article I of the Florida Constitution, then article X, section 16 must be stricken for two additional reasons: 1) the ballot summary failed to inform voters that the amendment would diminish or void fundamental constitutional protections; and 2) the amendment violates the single subject rule.

The Court struck an initiative amendment with similar problems in Advisory Op. to Attorney General - Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994). There, the proposed amendment would have affected various government functions and modified the basic rights protections provided by article I, section 2 of the Florida Constitution. These effects violated the single subject restriction for initiative amendments. Id at 1020. The proposal also violated ballot summary requirements because it omitted any mention of the

"myriad of laws, rules, and regulations" that the amendment would affect. Id. at 1021.

Voters had a right to know that a vote for article X, section 16 would diminish the constitutional protections available to those affected by the amendment.

It is the Court's duty to protect Appellants from the overzealous, unrestrained majority by invalidating the overreaching effects of article X, section 16 As Justice Roberts emphasized in his dissent in Weber v. Smathers, 338 So. 2d 819, 824 (Fla. 1976) regarding review of the "Sunshine Amendment," the constitutional initiative in Florida was designed to be the most restrictive method of amending the Constitution and should be more difficult because of the lack of discussion and debate, and checks and balances, prior to an initiative's submission to the electorate. Quoting from the concurring opinion by Justice Thornal in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970), he stated:

> [I]t would be easy to do as appellee urges us to do by transferring to the electorate the burden of making our decisions on an idealistic pronouncement 'to let the people decide.* This, however, is not, in my view, the fulfilment [sic] of our judicial responsibility. It is often much more difficult for us as judges to make a stand and 'do the people's will' when the responsibility is clearly ours under the law. It is the sort of responsibility which frequently we would as soon not have but which, nevertheless, we must assume as judicial officers.

Id. at 824.

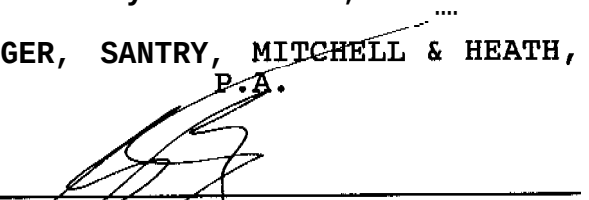
III.

CONCLUSION

For the reasons set forth herein and in the Initial Brief, Appellants respectfully request this Court declare article X, section 16, Florida Constitution, unconstitutional and a violation of Appellants' basic rights, and declare the amendment void for failure to comply with the statutory requirement that a ballot summary provide voters with sufficient information from which to make an intelligent and informed decision.

Respectfully submitted,

GRANGER, SANTRY, MITCHELL & HEATH, P.A.



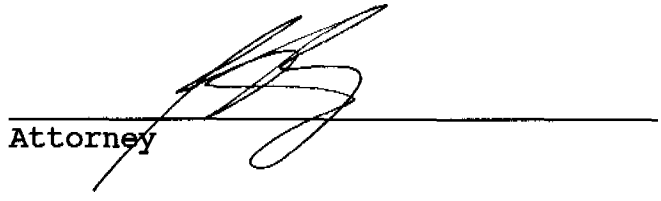
Frank J. Santry
FL BAR ID # 0202231
Victoria E. Heuler
FL BAR ID # 0984825
2833 Remington Green Circle
Post Office Box 14129
Tallahassee, Florida 32317
(904) 385-3800
(904) 385-3862 (FAX)

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL to Denis Dean, Assistant Attorney General, and Jonathan Glogau, Assistant Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050; and M.B. Adelson, Florida Department of Environmental Protection, 3900 Commonwealth Blvd., Rm. 628, Tallahassee, FL 32399-3000; Terry L. McCollough, Florida Conservation Association, 538 E. Washington St., Orlando, FL 32801;

and David Guest, Florida Wildlife Federation, Inc., Sierra Club Legal Defense Fund, P. 0. Box 1329, Tallahassee, FL 32302, *on* November 12, 1996



Attorney